No. 17473

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAN EMIL DONATO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Jurisdictional Statement.

On February 21, 1961, the Federal Grand Jury in and for the Southern District of California indicted appellant in a one count Indictment for knowingly failing and refusing to be inducted into the armed forces of the United States, in violation of Section 462 of Title 50 United States Code, Appendix. [C. T. 2.]*

After arraignment and the entry of a plea of not guilty, appellant was tried without a jury in the United States District Court for the Southern District of California, Central Division, on May 1, 1961, before the Honorable William M. Byrne [R. T. 4]**; and at the close of the trial and argument, was found guilty as charged, by Judge Byrne. [R. T. 36.]

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*"C. T." refers to Clerk's Transcript of Record.

**R. T. refers to Reporter's Transcript of Proceedings in the Trial Court.

On May 22, 1961, appellant was sentenced to the custody of the Attorney General for imprisonment for three (3) years. [C. T. 5.]

Jurisdiction of the District Court was based on Title 18 U. S. C., Section 3231, and Title 50 U. S. C., Appendix, Section 462.

Jurisdiction of this Court is based on Title 28 U. S. C., Sections 1291 and 1294.

Statement of the Case.

Insofar as not stated in the Jurisdictional Statement, the case is as follows:

On May 1, 1961, prior to the conclusion of the trial, appellant made a motion for judgment of acquittal, which motion was thereafter argued and denied. [R. T. 36.]

On May 22, 1961, appellant was sentenced, and immediately thereafter filed a Notice of Appeal from the Judgment of the court. [C. T. 5, 6.]

Appellant has specified as error, that "The District Court erred in failing to grant the Motion for Judgment of Acquittal" (A. B. 6); and particularized his argument on two grounds, as hereinafter will be referred to in the opening of Appellee's Argument (A. B. Index.)

Statutes, Regulations and Memorandum Involved.

Title 50, United States Code, Appendix, Section 462, provides, in pertinent part, as follows:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this

Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

Title 32, Code of Federal Regulations (Selective Service Regulations), provides, in pertinent part, as follows:

Section 1624.1(a):

"OPPORTUNITY TO APPEAR IN PERSON.—Every registrant, after his classification is determined by the local board . . . shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended." (See also Local Board Memorandum No. 52, paragraphs 1, 2(a) and 3.)

Section 1624.2:

"APPEARANCE BEFORE LOCAL BOARD. —(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. A notation that he has appeared shall be entered on the Classification Questionnaire (SSS Form No. 100).

"(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."

Section 1626.2:

"APPEAL BY REGISTRANT AND OTHERS. — (a) The registrant, . . . may appeal to an appeal board from the classification . . . by the local board in any class other than Class I-C, Class I-W, Class IV-F, and Class V-A."

". . . (c) The registrant, . . . may take an appeal authorized under paragraph (a) of this section at any time within the following periods:

(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110)". . . .

"(d) At any time prior to the date the local board mails to the registrant an Order to Report

for Induction (SSS Form No. 252), the local board may permit any person described in paragraph (c) of this section to appeal even though the period for taking an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board thereafter permits an appeal, the right of such persons to appeal shall expire at the end of the period provided for in paragraph (c) of this section. If an extension of time to appeal is granted by the local board, a record thereof shall be entered on the Classification Questionnaire (SSS Form No. 100)."

Section 1626.11(a):

"HOW TO APPEAL TO APPEAL BOARD IS TAKEN.—(a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal."

Statement of Facts.

The following undisputed factual information is abstracted from appellant's Selective Service file, a photostatic copy of which was received into evidence as Plaintiff's Exhibit No. 1 after stipulation of both parties to such admission [R. T. 26], and from testimony and

other evidence received during the course of the trial. Although appellant has attempted to outline the history of this case (A. B. 1-5)* it is submitted that the following chronological résumé will more completely present the matter which should be before this court on this appeal.

On January 18, 1955, appellant registered with Local Board No. 85 (hereinafter referred to as "the Board") North Hollywood, California [Ex. 3].**

On February 10, 1955, the Board sent Selective Service Classification Questionnaire, SSS Form 100, to appellant [Ex. 5] which was thereafter completed and returned to the Board on February 24, 1955. In this Form 100, appellant claimed to be a conscientious objector to participation in war. [Ex. 11.] Pursuant to this claim, a Special Form for Conscientious Objectors, SSS Form 150, was mailed to appellant, who completed it and returned it to the Board on or about March 1, 1955. [Ex. 12.] Subsequently on January 21, 1958, the Board mailed a Selective Service Dependency Questionnaire, SSS Form 118, to appellant, who thereafter completed and returned it to the Board on or about February 3, 1958. [Ex. 17.]

On February 19, 1958, the Board classified appellant in Class I-A by a vote of 2-0 and on this same date, mailed a Notice of Classification, SSS Form 110 to appellant notifying him of said classification. [Ex. 12.] When asked, during cross-examination at the trial, whether he was aware of his right to appeal

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*"A. B." refers to appellant's Brief on Appeal.

**Ex. refers to Plaintiff's Exhibit No. 1 and pagination appearing therein.

and to request a personal appearance before the Board during the ten days after the SSS Form 110 was mailed to him, appellant testified, in essence, that he was aware of such rights and that he chose not to exercise them. [R. T. 31-32.]

On September 29, 1959, the Board mailed an Order to Report for Armed Forces Physical Examination, SSS Form 223, to appellant ordering him to present himself for physical examination on November 6, 1959. [Ex. 21.] Appellant did so report on November 6, 1959. On November 16, 1959, the Board mailed a Statement of Acceptability to appellant advising him that he had been found fully acceptable for induction into the Armed Forces. [Ex. 12, 22.]

On May 20, 1960, the Board mailed an Order to Report for Induction, SSS Form 252, to appellant, ordering him to report on June 13, 1960, at 8:00 A.M. at the Los Angeles Examining and Induction Station. [Ex. 12, 23.] Subsequently, on June 8, 1960, the Board requested postponement of appellant's induction from the District Coordinator, Selective Service System, for the purpose of reopening appellant's classification, to reconsider appellant's claim of conscientious objection to war. [Ex. 24.] On this same date, June 8, 1960, appellant was notified that his induction had been postponed until further notice, by a Postponement of Induction, SSS Form 264. [Ex. 25.] Also on this same date, a letter was sent from the District Coordinator, Selective Service System, giving the Board formal authority for the postponement of appellant's induction and for the reopening of his classification. [Ex. 27.]

Thereafter, on June 21, 1960, the Board mailed a letter to appellant requesting him to present himself for an *interview* with the Board on July 13, 1960 at 8:15 A.M., for the purpose of clarifying information in his Selective Service file. [Ex. 28.] This *interview* was to be conducted in conformity with Selective Service Board Memorandum No. 52, Paragraph 3(a).

On July 13, 1960, appellant was interviewed by three members of the Board. When asked if he had any other information to present appellant merely acknowledged that he had been called at the Board's request and wanted to know if they had any questions they would like to ask him. He told the Board that he averaged eight to ten hours of preaching per month and that although he did not believe his ministerial work was enough for him to be classified as a minister he thought he should have a I-O classification as a conscientious objector rather than a I-A classification. Appellant further advised the Board that if he were ordered to work, if he were classified I-O, he would not go to work but that he wanted a I-O classification. He further told the Board that "he would protect anybody or himself against injury or harm, no matter where they lived." He further advised the Board that he did excavation work for a living. [Ex. 29.]

On the same date, July 13, 1960, the Board re-classified appellant in Class I-A based on his interview, by a vote of 3-0 [Ex. 12] and mailed SSS Form 110 to appellant notifying him of such classification. [Ex. 12.] After referring to the last mentioned notice, during the trial, it was stipulated by the parties "that the Form SSS 110 that he received notified him of his right to appeal". [R. T. 27.]

On direct examination by Mr. Tietz, appellant was asked the following questions and replied with the corresponding answers:

". . .

Q. Why didn't you take an appeal when you got the notice, whatever it said on it, after this meeting? A. Well, I had made up my mind to take an appeal within the 10 days, and in my work I had signed up with the U.S. Forestry Service to fight fires in case a forest fire did arise in Los Angeles County and in Angeles National Forest, or in Los Padres Forest, and on July 18, I was notified that I should get everything ready, they had a fire, and then on July 20th, at midnight I was called to go to work on this fire." [R. T. 29-30.]

On cross-examination of the appellant, the following testimony was elicited:

". . .

Q. Then referring to your second notice of classification that was sent to you, sir, on July 13th, when did you start to fight fires, sir? A. July 20th at midnight is when I actually officially started.

Q. When did you leave your home area for the fire area? A. That date, the 20th.

Q. Approximately seven days, then, after July 13th? A. That is correct.

Q. Had you received your notice prior to the time that you left to fight the fire, sir? A. Yes, I had.

Q. How long beforehand? A. Approximately five days.

Q. And you were aware then, as before on the first notice, of your right to appeal and to request a personal appearance within 10 days? A. Yes, I had gotten further information on appealing this particular instance, and I was preparing information to send an appeal in.

Q. Did you know that a letter would have served for a request for personal interview without going into great detail at that time, that as a matter of right you could just request a personal appearance? A. At this time I did not know this. I expected to make a personal appearance.

Q. I know, but I am referring to requesting the personal appearance; I am not referring to the actual appearance? A. I understood a letter will usually suffice for any type of action of this type to make a request." [R. T. 32-33.]

When asked when he returned from fire fighting, appellant replied "approximately the 28th of July." [R. T. 33.] The final question asked appellant on this subject, was:

"Q. Did you contact the Board thereafter, sir, with reference to the possibility of another request for personal appearance and perhaps to try to explain your delay? A. *No, I did not because of the fact that the 10 days were specifically specified to the fact that an appeal would not be acceptable after the 10 days,* so I left it at that and I thought when the time came, it would be explained." (Emphasis added.) [R. T. 33.]

On August 11, 1960, the Board ordered appellant to report for induction, by SSS Form 252, at the Los

Angeles Examining and Induction Station on September 23, 1960, at 8:00 A.M. [Ex. 30.] On September 23, 1960, appellant reported to the Induction Station and was found acceptable for induction into the Armed Forces. [Ex. 34.] He thereafter refused to "step forward to be inducted." [R. T. 25] and was advised by the Deputy Commanding Officer for Induction, Lt. Boughton, "that his refusal to submit to induction constituted a felony under the Universal Military Training and Service Act, that if found guilty was punishable as such by five years in prison or $10,000 fine or both." [R. T. 25.] He was given two more opportunities to step forward and failed to do so on each such occasion. [R. T. 25, 26.]

Thereafter appellant executed a handwritten statement to the effect that "he refused to be inducted into the armed forces of the United States." [R. T. 26; Ex. 31, 32, 55.]

Summary of Argument.

Appellant has not exhausted the administrative remedies available to him to attack his reclassification in class I-A by his Local Board. He had no standing to do so for the first time, in the trial court, as the basis of a motion for judgment of acquittal following his conviction for having refused to submit to induction into the Armed Forces of the United States.

Argument.

Appellant, through his able and experienced counsel, has presented to this Court an 18 page brief, which specifies that the trial court committed error by not granting his motion for judgment of acquittal; the argument supporting this specification was two-fold:

> "I. No Basis in Fact is Present to Support the Denial of a Conscientious Objector Classification.
>
> II. The Law Does Not Permit Denials of Conscientious Objector Classifications to Be Based on the Tests Applied to This Appellant." (A. B. Index).

Appellee is at a loss to understand how these arguments can be presented to this Court, in this fashion, in light of numerous decisions in this Circuit and by the Supreme Court, which have repeatedly required a person, attacking the classification by a local board, to show that he has exhausted the administrative and procedural remedies available to him, *prior* to his raising such a contention in a trial court.

Appellant's entire argument is devoted to attacking his classification by the Local Board, without so much as an attempt to meet the obvious controlling issue which must first be decided by this Court.

The evidence is clear that appellant made no efforts whatsoever, to request a personal appearance before his Local Board after he was rcelassified I-A on July 13, 1960, or to appeal that classification in the manner prescribed by law. Admittedly, he knew of his right to appeal [R. T. 32, 33] and that such could be accomplished by letter [R. T. 32]; and that such

right expired after 10 days. [R. T. 32.] Yet, confronted with this factual and classical situation of a failure to exhaust remedies, the sole reference made in appellant's opening Brief thereto, was this casual statement:

> "He did not take an appeal for reasons that were related in his testimony; this subject will be argued in our closing Brief *if* appellee raises an issue on it." (Emphasis added). (A. B. 5.)

Appellee does not raise the issue. It is inherent in the case and it is submitted that the solution thereof must necessarily control the outcome of this appeal.

A registrant is given certain procedural remedies which he may follow, upon receiving a classification with which he disagrees. The rights of personal appearance, and of appeal of selective service classification are clearly set out in 32 C. F. R. Sections 1624.1(a) [as implemented by Local Board Memorandum No. 52]; 1624.2(a) and (b); 1626.2(a), (c)(1), and (d); and 1626.11(a).

The problem is not unique to the Appellate Courts to find a registrant, who has believed himself deserving of a classification as a conscientious objector, minister, or other than that which he receives, who fails to ever raise his voice in disagreement until he is before a District Court under indictment for violation of the Selective Service laws.

At least as early as 1944, the problem was raised when a registrant had been classified I-O by his Local Board and thereafter ordered to report for an assignment of work of national importance. This registrant, one Falbo, never did report as so ordered, and

refused to do so. Interestingly enough he *had* availed himself of an administrative appeal prior to his ultimate classification, yet did not comply with the last order of his Board. On an appeal from a conviction for this failure, he argued that he was entitled to a statutory exception from all forms of national service "since the facts he had presented to the Board showed that he was a 'regular or ordained minister.'" He further contended that the act "does not make it a crime to refuse to obey an order to report for service if that order is based upon an erroneous classification, because there is no 'duty' to comply with a mistaken order."

The Supreme Court outlined the problems confronting the nation, regarding national defense, and set out the basic structure and purpose of the Selective Service System [which it will be noted is noted somewhat greater in scope than was appellant's limited definition, as being merely "to classify" (A. B. 14)]; and the minimal compliance with its procedures necessary, antecedent to making an attack on the conclusions reached in its process. The court stated in *United States v. Falbo,* 320 U. S. 549 (1944), as follows, at page 551, *et seq.*:

> ". . . (T)he Act was passed to mobilize national manpower with the speed with which that necessity and understanding required. . . .
>
> "The mobilization process which Congress established by the Act is designed to operate as one continuous process for the selection of men for na-

tional service. Under the system, different agencies are entrusted with different functions but the work of each is integrated with that of the others. Selection of registrants for service, are to be effected within the framework of this machinery as implemented by rules and regulations prescribed by the President . . . The registrant may contest his classification by a personal appearance before the Local Board, and if that board refuses to alter the classification, by carrying his case to a board of appeals, and thence, in certain circumstances, to the President. Only after he has exhausted this procedure is a protesting registrant ordered to report for service . . . Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the Local Board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for military service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

"We think it has not . . . Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so. . . ."

Thus, although this defendant had followed certain administrative procedures, regarding his original appeal of classification, the Court held that his failure to

complete the administrative processing, within the framework of the then current Act,[1] prohibited the trial court from examining the propriety of the board's actions in classifying him as it did.

In *Estep v. United States,* 327 U. S. 114 (1945), the Court made very clear that although it was not deciding the merits of the appellant's contention, as to whether the board had a basis in fact for its classification, it was finding that the petitioners were denied an opportunity *to show* that their local boards exceeded their jurisdiction. At pp. 115 and 116, the Court referred to its earlier decision in *United States v. Falbo (supra),* and noted, that in that case:

> "We found no provision for judicial review of a registrant's classification prior to the time when he had taken all the steps in the selective service process and had been finally accepted by the armed services."

The Court further pointed out how it was able to reach its ultimate decision, (in *Estep),* not being hampered by the problem that it was in *Falbo.* The Court distinguished the two cases by noting at p. 123:

> "In the Falbo case the defendant challenged the order of his Local Board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could have been done. . . ."

The following year, 1946, marked a third expression of the Supreme Court, consistent with its earlier

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[1]Selective Service Act of 1940, 50 U. S. C. Appendix §§301-318.

positions. In *United States v. Balogh,* 329 U. S. 692 (1946), the Court reversed the judgment of the Court of Appeals for the Second Circuit which had previously reversed Balogh's conviction because of a denial of a fair hearing by the board (*United States v. Balogh,* 157 F. 2d 939, 944 (2 Cir. 1944)). This *per curiam* decision of the Supreme Court, in vacating the judgment and remanding the case to the Court of Appeals, citing *Falbo,* clearly solidified the requirement of exhaustion of remedies prior to such an attack on a classification by a Local Board.

Nor has there been a dirth of decisions on this same problem in this Circuit. Appellant's counsel himself has argued many cases before this Court where all administrative remedies had not first been fully exhausted, where this Court clearly delineated the scope of review of the trial and appellate courts.

See:

Williams v. United States, 203 F. 2d 85 (9 Cir. 1953), 345 U. S. 1003 (1953);

Mason v. United States, 218 F. 2d 375 (9 Cir. 1954);

Evans v. United States, 252 F. 2d 509 (9 Cir. 1958).

In *Williams, supra,* this Circuit affirmed a conviction of a defendant who had refused to report for induction, and pointed out at p. 87:

> "After intentionally refusing to conform to the order of the Board, the selectee may not challenge his classification in a criminal prosecution for his failure to do so since he also failed to pursue the appellate steps provided by the Selective Service

Act." (Citing *Falbo v. United States,* 320 U. S. 549 (1944), and *Estep v. United States,* 327 U. S. 114 (1945).)

And, at p. 88, the Court continued by noting that a selectee must show that:

> ". . . he has complied with all the steps in the selective service process. Only then will judicial review of an alleged violation of a selectee's constitutional rights by his Local Board be available . . . (citing *Falbo, supra* again). . . . Appellant did not comply with all the steps in the selective service process. Therefore, he may not attack his classification or the Board's procedure. . . ."

The *Mason* case *(supra),* similarly raised the question of a classification by a local board without basis in fact therefor, and the Court citing *Falbo (supra),* and *Williams (supra),* concluded at p. 380, that due to his failure to exhaust his administrative remedies:

> "The appellant was without standing to assert in the trial court the invalidity of the order for induction."

Finally, in *Evans (supra),* this Court again rejected the claim that the local board has used arbitrary and artificial tests in classifying the registrant. This is the same as the second argument raised by this appellant on the instant appeal. The Court in pointing out that the conviction must be upheld unless appellant could properly have raised a question as to his I-A classification during his trial, said at p. 513:

> ". . . (A)ppellant attempts to exclude his case from the exhaustion of remedies rule on the

basis that the Local Board determined his classification by arbitrary action and thereby denied him due process. But a claim by a registrant of lack of due process in his Local Board classification does not relieve him from the requirement of taking the appellate steps available to him administratively before attempting a collateral attack on the classification." (Citing *inter alia, United States v. Balogh,* 329 U. S. 692 (1946); *Mason v. United States,* 218 F. 2d 375, 379 (9 Cir. 1954); *Kalpakoff v. United States,* 217 F. 2d 748 (9 Cir. 1954); *Francy v. United States,* 217 F. 2d 750 (9 Cir. 1954).

In *Prohoroff v. United States,* 259 F. 2d 694 (9 Cir. 1958), counsel again claimed an unlawful classification, in a situation where no administrative appellate steps had been taken by the appellant. It is submitted at this time that the holding in that case, along with other references herein, compels a similar and uniform disposition of this appeal. The Court in *Prohoroff* pointed out, at p. 696:

"The recent decision of this Court in *Evans v. United States, supra,* after exhaustively reviewing decisions of this and other courts, held that a registrant failing to exhaust his remedies of administrative appeals under circumstances similar to those just stated in Appellant's conduct has no standing to seek from the Court the same relief he might have obtained by such administrative appeals . . . The *Evans* case rule on that point is clearly applicable here in this case. We reject appellant's contention of error in the District

Court respecting his classification and induction notices, since he knowingly failed to exhaust his remedies of administrative appeal."

For other cases holding similarly as those discussed herein, see:

Skinner v. United States, 215 F. 2d 767 (9 Cir. 1954);

Kaline v. United States, 235 F. 2d 54, 62 (9 Cir. 1956);

Shaw v. United States, 264 F. 2d 118 (9 Cir. 1959).

Appellant has chosen to ignore all of these cases and to proceed with arguments which have uniformly been held to be beyond the scope of review in such a situation as is before this Court. Although appellant admitted knowledge of his rights to a personal appearance and to an appeal thereafter, he chose to proceed no further in that direction after either his first or second classification of I-A. The reopening of his case by the Local Board for reexamination gave appellant a second chance to avoid his prior failure in this regard, but such was not to be accomplished. He ignored his procedural rights for the second time and then refused to submit to induction. It is true that the second classification superseded the prior classification and that subsequent thereto was when appellant must necessarily have acted to properly raise the questions now presented by him to this Court.

See:

32 C. F. R. 1625.11, 1625.12, 1625.13;

Evans v. United States, 252 Fed. 509, 511 (9 Cir. 1958);

Hinkle v. United States, 216 F. 2d 8, 9 (Footnote 3) (9 Cir. 1954);

Goetz v. United States, 216 F. 2d 270, 272 (9 Cir. 1954).

A final reference might be noted to *Kretchet v. United States,* 284 F. 2d 561 (9 Cir. 1960). In that case this Court *was able to consider* the questions which were raised by the appellant inasmuch as he had availed himself of all proper remedies at the administrative level. It is interesting that in making its ultimate finding, that inasmuch as it was unable to determine exactly what grounds the Appeal Board had used to decide the appellant's classification, it would reverse the conviction, the Court cited as authority, among other cases, "*United States v. Balogh,* 157 F. 2d 939, 943-944 (C. A. 2d 1946), judgment vacated on other grounds, 329 U. S. 692. . . ." The very grounds on which *Balogh* was vacated, if present in Kretchet would have necessitated a contrary decision there, in conformity with the *Supreme Court opinion,* rather than with the lower court's holding. It is submitted that the instant case presents exactly such a situation.

Appellant has argued that:

> "The attitude of the Selective Service System and of the court below, concerning whether there was a basis in fact for the classification was grounded upon error . . . it ignores the teachings of Dickinson v. United States, 346 U. S. 389 (1953) . . . Also ignored are the teachings of Ashauer v. U. S., (9th Cir., 1954) 217 F. 2d 788, 791; Blevins v. U. S., (9th Cir., 1954) 217 F. 2d 506, 508; Brown v. U. S., (9th Cir.,

1954) 216 F. 2d 258; Chernekoff v. U. S., (9th Cir., 1955) 219 F. 2d 721, 725; Franks v. U. S., (9th Cir., 1954) 216 F. 2d 266, 269; Hacker v. U. S., (9th Cir., 1954) 216 F. 2d 575, 576. *(sic).*"

Appellee admits that the Board and court did ignore these decisions, and properly so because of their inapplicability to the case at bar. Each of the latter group of cases cited by appellant involves a situation where the merits of the contention were ripe for consideration by the trial court. The defendants therein had each fully exhausted their administrative remedies and were in a position to present their case to the court for determination. These cases have no bearing on the key issue before this court.

Similarly *in apropos* are the cases cited on page 11 of Appellant's Brief regarding the applicability of cases involving ministerial exemptions to those persons seeking deferments as conscientious objectors. In *White v. United States,* 215 F. 2d 782 (9th Cir., 1954), this court held that a distinction must be drawn between a claim of ministerial status and a claim of conscientious objectors, because the one is and the other is not susceptible of objective proof. The court in *White* expressly agreed with *United States v. Simmons,* 213 F. 2d 901 (7th Cir., 1954), revd. on other grounds 348 U. S. 397 (1954), the one case which appellant cites as being *contra* to the position appellant now urges upon this court. Wherein does appellant thus find basis for urging the rationale of these cases or of *Dickinson (supra), et al.* (ministerial deferment cases) as controlling the court's present decision? No claim has ever been made that the board should have classified appellant IV-D, as a minister.

Although appellee does not intend to argue the underlying merits of appellant's contention, at any length, it is submitted that even if appellant *had* properly proceeded with all administrative steps, his specification of error would still be untenable-and not subject to review under the doctrine of *Estep v. United States,* 327 U. S. 114 (1945), wherein the court pointed out at page 122, that:

> "The courts are not to weigh evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave to the registrant."

And in *Witmer v. United States,* 348 U. S. 375 (1954), the court added at pages 380-381:

> "The courts may not sit as super draft boards, substituting their judgment on the weight of the evidence for the judgment of the designated selective service agencies."

See:

> *United States v. Mohammed,* 288 F. 2d 236 (7th Cir., 1961), citing and following *Witmer (supra).*

It is respectfully submitted that appellant has not met and cannot meet the burden of establishing the basis for his appeal. He has alleged a "prima facie showing" that his classification should have been other than what it was, yet he had no standing to make even that unsupported contention. The scope of judi-

cial review of a selective service classification, is at best, very limited, even when one has properly availed himself of all prerequisites necessary to open the door of contention. However, that door has been closed and locked here, appellant himself having thrown away the key.

Conclusion.

1. Appellant did not exhaust his administrative remedies within the framework of the Selective Service System.

2. Appellant had no standing to seek judicial review of his selective service classification.

3. There were no errors of law in the trial court.

4. The judgment of the trial court should be affirmed.

Respectfully submitted,

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